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statistical process control requires stability in the process being measured. Yet, as BellSouth's own charts confirm, BellSouth's performance for CLECs is not yet stable, but varies widely from month to month.⁹⁷ Moreover, BellSouth's statistical process control charts do not take into account at all the variance within each month of BellSouth's performance for CLECs. Further, no basis has been shown here for the assumption underlying statistical process control that the variability of performance is unchanged from month to month and not affected by any external causes. In sum, BellSouth's statistical process control charts are not an appropriate way to determine whether discrimination is present.⁹⁸

⁹⁷ See, e.g., Stacy PM Aff., Ex. WNS-9, pp. 1, 4, 7, 8, 14, 15, 16, 21, 24, 27, 28, 30 (charts for the percentage of provisioning appointments met (both residential resale dispatch and business resale non-dispatch), percentage of maintenance appointments met (both business resale dispatch and business resale non-dispatch), the percentage of maintenance repeat troubles within 30 days (residential resale non-dispatch, business resale dispatch, and business resale non-dispatch), the percentage of provisioning troubles within 30 days (both residential resale dispatch and business resale non-dispatch), the percentage out of service less than 24 hours (both business resale dispatch and business resale non-dispatch), and the percentage of provisioning troubles within 30 days (local interconnection trunking)).

⁹⁸ In addition, where control charts are used to monitor percentage-based or proportional measures like those employed by BellSouth, an additional complication is presented by the fact that month-to-month stability of the upper and lower control limits requires that sample sizes be the same for all periods. In fact, however, the CLEC sample size is likely to be substantially smaller than the BellSouth sample size used to generate the control limits.

**2. BellSouth Has Attempted To Use Statistical Process Control To
Immunize Itself From Claims Of Discrimination.**

61. Even if statistical process control could appropriately be applied in this situation, it is apparent that BellSouth has set the control limits used on its charts to conceal discriminatory behavior, not to reveal it. By setting its control limits very broadly, BellSouth has prepared its charts so that only the most flagrantly discriminatory behavior by BellSouth would ever fall outside the control limits. As noted above, BellSouth has established its upper and lower control limits using three standard deviations. This translates to the use of a 99.75 % confidence level, or a 99.75 % likelihood that BellSouth's performance for a particular month will fall within the control limits based on its past performance. This means that there is only a 0.25 % probability that BellSouth's performance would fall outside the control limits -- either above or below -- or only a 0.125 % probability that its performance would fall outside the particular control limit which represents worse performance. In other words, BellSouth has defined parity to include any performance falling within a range that includes virtually all the extremes of BellSouth's performance. While this approach virtually eliminates the possibility that BellSouth might be falsely accused of discrimination, it also shields all but the most extreme instances of discrimination by BellSouth from scrutiny and leaves CLECs highly vulnerable to undetected discrimination in performance.⁹⁹

⁹⁹ In the case of BellSouth's chart for the percentage of provisioning troubles within 30 days
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62. BellSouth's approach also defines discrimination more narrowly than the standard generally followed by the federal courts in discrimination cases, where I understand a difference of two standard deviations is sufficient to establish a prima facie case of discrimination.¹⁰⁰ Indeed, the argument that the disparity between two groups must be at least three standard deviations from the mean before an inference of discrimination is appropriate has been specifically rejected in discrimination cases.¹⁰¹

63. Instead of its proposed "statistical process control" charts, BellSouth should be required to use a more appropriate and customary statistical test of discrimination to support its claim of nondiscrimination. Such a statistical test would directly compare BellSouth's average (or mean) performance for CLECs for the particular month with its average performance for its own retail operations for that same month, together with an

⁹⁹ (...continued)

for residential resale service where a dispatch is required, BellSouth's process control methodology results in a control range extending all the way from 19.29% to 95.63%. See Stacy PM Aff., Ex. WNS-9, p. 21. This means that any percentage of provisioning troubles within 30 days for CLECs less than 95.63% would fall within the control range defined by BellSouth even though BellSouth's average performance of 57.46% is nearly 40 percent lower.

¹⁰⁰ See, e.g., *Kendon v. AT&T Technologies*, 883 F.2d 388, 398 (5th Cir. 1989) (finding that differences in excess of "[t]wo standard deviations are also sufficient to establish liability [for discrimination]"); *Palmer v. Shultz*, 815 F.2d 84, 92 (D.C. Cir. 1989) (difference of 1.96 standard deviations sufficient).

¹⁰¹ See *Kendon v. AT&T Technologies*, 883 F.2d 388, 397-98 (5th Cir. 1989) (rejecting claim that a disparity of three standard deviations is an appropriate minimum requirement for statistical significance in discrimination cases).

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assessment of performance variability. For example, the California Public Utilities Commission recently approved a "parity" provision developed by the staff of the Commission, which has been incorporated into the AT&T-Pacific Bell Interconnection Agreement. That provision states that, for purposes of defining Pacific's contractual service quality obligations to AT&T, "parity is achieved when Pacific's service performance [for AT&T], as defined by the designated comparable measures, is within 1.65 standard deviations (90% confidence level) of [Pacific's] average retail performance for the equivalent retail product or service."¹⁰²

64. By similarly requiring a direct comparison of BellSouth's monthly behavior for CLECs with its monthly performance for its own retail operations, this Commission will be in a far better position to draw fact-based conclusions regarding whether or not the performance delivered to CLECs is equal to, or no worse than, that which BellSouth provides to itself. Such a direct monthly comparison of performance would use the same data that BellSouth uses for its process control charts, and thus would impose no additional burden

¹⁰² See AT&T-Pacific Interconnection Agreement, Att. 17, p. 2. While the use of 1.65 standard deviations produces a 90% probability (90% confidence level) that a result outside of the parity range (that is, either significantly better or significantly worse than the mean) is not a random occurrence, where -- as in this case -- the only relevant issue to be tested is whether performance for one group was significantly *worse* (which may be a higher or lower number depending on the measurement), the only results of interest are those that are both outside the parity range and worse (a "one-tailed" test). If only *worse* performance is pertinent, the use of 1.65 standard deviations corresponds to a 95% confidence level that a *worse* result outside the parity range is not a random occurrence. See *Palmer v. Shultz*, 815 F.2d 84, 92, 95-96 (D.C. Cir. 1989).

on BellSouth. Moreover, the impact of seasonal differences or extraordinary events like hurricanes or blizzards should be reflected equally in the monthly performance data for all parties.

65. I am also concerned that the trigger proposed by BellSouth for investigating and remedying discrimination is grossly inadequate to provide parity or to protect competition. BellSouth has proposed that, unless its performance falls outside of its broad control limits, no action should be considered unless its performance for CLECs is worse than its performance for itself for three consecutive months, and even then only an undefined joint "investigation" or "study" would be commenced.¹⁰³ During that entire period, CLECs would have to suffer inferior performance. Moreover, this approach would create an incentive for BellSouth to manage a pattern of "two bad months -- one good month" simply by shifting its resources, thereby both providing inferior service to CLECs and precluding any remedy.

3. BellSouth's Statistical Process Control Charts Do Not Show Nondiscriminatory Performance For CLECs.

66. Notwithstanding the self-serving assumptions on which BellSouth's statistical process control charts are based, those charts do not support BellSouth's claim that it is providing nondiscriminatory performance for CLECs. Quite the contrary, even applying the very narrow definition of discrimination advocated by BellSouth -- that is, performance for

¹⁰³ Stacy PM Aff., ¶ 32.

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CLECs three standard deviations worse than the historical mean of BellSouth's performance for itself -- in August alone (the most recent month for which data is provided), BellSouth's process control charts show *discriminatory* performance for CLECs for 6 of the 28 resale performance measurements provided by BellSouth, including (1) the percentage of provisioning appointments met (residential resale non-dispatch), (2) the percentage of provisioning appointments met (business resale non-dispatch), (3) the percentage of maintenance appointments met (residential resale non-dispatch), (4) the percentage of maintenance appointments met (business resale non-dispatch), (5) maintenance average receipt to clear (business resale dispatch), and (6) the percentage of provisioning troubles within 30 days (business resale non-dispatch).¹⁰⁴

67. A number of BellSouth's charts also show discriminatory performance for CLECs based on the alternative test of discrimination proposed by BellSouth -- poorer performance for CLECs relative to BellSouth's performance for itself for three or more consecutive months.¹⁰⁵ Those charts include the (1) the percentage of provisioning appointments met (residential resale non-dispatch (both worse and out of the control limits for all 7 months)), (2) the percentage of provisioning appointments met (business resale non-

¹⁰⁴ Stacy PM Aff., Ex. WNS-9, pp. 2, 4, 6, 8, 11, 24. Similarly, BellSouth's statistical process control charts show 8 of the 28 resale measures outside the control limits in June, and 4 outside in July.

¹⁰⁵ See Stacy PM Aff., ¶ 32.

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dispatch (last 3 months)), (3) the percentage of maintenance appointments met (business resale dispatch (last 6 months)), (4) the percentage of maintenance repeat troubles within 30 days (residential resale non-dispatch (6 out of 7 months, including 3 outside control limits)); and (5) the percentage of provisioning troubles within 30 days (business resale non-dispatch (last 4 months, including 2 well outside control limits)).¹⁰⁶

68. Indeed, for several of the most critical measures, BellSouth's performance for CLECs was so bad that not only was its August monthly performance for CLECs outside of BellSouth's control limits, but even its year-to-date average performance for CLECs falls outside of BellSouth's control limits.¹⁰⁷ BellSouth cannot simply dismiss these poor performance results for CLECs as "not statistically different."¹⁰⁸ The whole purpose of statistical process control is to identify statistically significant deviations from expected performance that require action on the part of management. If BellSouth does not contend that

¹⁰⁶ Stacy PM Aff., Ex. WNS-9, pp. 2, 4, 7, 14, 24.

¹⁰⁷ See Stacy PM Aff., Ex. WNS-9, pp. 2, 4, 5, 14 (percentage of provisioning appointments met (residential resale non-dispatch [average performance 30 standard deviations below lower control limit, or 33 standard deviations below the mean], percentage of provisioning appointments met (business resale non-dispatch [average performance 4 standard deviations below lower control limit]), percentage of maintenance appointments met (residential resale non-dispatch), and percentage of maintenance repeat troubles (residential resale non-dispatch)).

¹⁰⁸ Stacy PM Aff., ¶ 51.

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its statistical process control charts identify differences in performance that are statistically significant, those charts have no relevance to this case.

69. Nor can the poor performance for CLECs identified on BellSouth's statistical process control charts be dismissed as insignificant to competition. For example, based on BellSouth's data on order volumes, the category "residential resale non-dispatch" accounted for 69 percent of CLEC order volume and 83 percent of BellSouth's order volume in August.¹⁰⁹ Yet BellSouth's statistical process control charts show that its average year-to-date performance for this category was outside of BellSouth's control limits for 3 out of the 7 resale measures provided by BellSouth, and that its percentage of provisioning appointments met for CLECs was so bad that BellSouth's performance was below the lower control limit for every single one of the seven months included in BellSouth's data, resulting in an average year-to-date performance that is *33 standard deviations* below BellSouth's mean performance for its own retail operations.¹¹⁰ Even BellSouth is forced to admit that this data shows "significantly" poorer performance for CLECs.¹¹¹

¹⁰⁹ See Stacy PM Aff., Ex. WNS-10, pp. 17-20.

¹¹⁰ Stacy PM Aff., Ex. WNS-9, p. 2.

¹¹¹ Stacy PM Aff., ¶ 51. Although Mr. Stacy attempts to dismiss those results as the product of "CLEC caused errors," he provides no factual basis whatsoever for this assertion. Furthermore, BellSouth's measure is based on BellSouth's committed due dates, not the due dates requested by the CLEC, and BellSouth does not assign the due date until after it has

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70. In sum, notwithstanding the manner in which BellSouth's statistical process control charts have been set up to shield virtually any discrimination against CLECs from detection, BellSouth's statistical process control charts actually establish that BellSouth is *not* delivering nondiscriminatory performance to CLECs.

B. BellSouth's Performance Measurements Are Inappropriate Insofar As They Are Reported Only As A Percentage Within Some Target Interval.

71. BellSouth's performance measurements are also inadequate to establish parity insofar as BellSouth reports only a percentage within some target level of performance (or, conversely, the percentage exceeding a target) rather than its average level of performance both for CLECs and for itself. While meeting a target level of performance can provide "useful information" in some situations,¹¹² the Commission made clear in its *Ameritech Michigan Order* that such measurements do not provide sufficient information to determine whether discrimination is present because reporting only the frequency that a target was, or

¹¹¹ (...continued)

accepted the CLEC's order as "a good LSR" and a service order has been issued to its Service Order Control System. See Stacy PM Aff., Ex. WNS-8, p. 1.

¹¹² *Ameritech Michigan Order*, ¶ 168. For example, such measurements can be used to monitor whether the performance of a single company is improving over time, or for assessing whether or not one party is achieving performance requirements established in a contract or by a regulatory agency.

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was not, achieved, fails to disclose the actual levels of the company's performance for the groups being compared and can thus conceal substantial performance disparities.¹¹³

72. Despite the Commission's clearly expressed preference for performance data directly comparing the BOC's average performance for CLECs with its average performance for its own local retail operations, BellSouth continues to report some data solely on a percentage within target format rather than providing a direct comparison of its actual performance for CLECs and itself. For example, rather than reporting its average answer time for CLECs and itself, BellSouth reports only the percentage of calls answered within 30 seconds.¹¹⁴ This measure would mask an obvious failure to provide parity of performance if BellSouth's Local Carrier Service Centers answer calls from CLECs in 25-30 seconds, while BellSouth's retail representatives answer calls from BellSouth's own retail customers within 5 seconds. Similarly, the timeliness of providing firm order confirmations, order rejections, and order completion notices should be reported for parity purposes as an average time, not as a

¹¹³ See, e.g., *Ameritech Michigan Order*, ¶ 166 (quoting Department of Justice example to show that such measures "can mask discriminatory behavior"), ¶ 168 (rejecting data on due dates missed and orders not completed within 6 days as insufficient to show nondiscrimination on the ground that "such measurements do not, in and of themselves, demonstrate that [the BOC] is providing equivalent access to OSS functions"), ¶ 211 n.542 ("performance measures in the form of intervals met . . . can mask discrimination within the target interval"), ¶ 234.

¹¹⁴ See Stacy PM Aff., Exs. WNS-2 & WNS-3.

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percentage provided within some target number of minutes or hours.¹¹⁵ In light of its disregard of the Commission's prior decision on this issue, the Commission should reiterate that measures expressed on a percentage within target (or percentage exceeding target) basis should be avoided for purposes of parity reporting in favor of measures of the BOC's actual mean performance for CLECs and its own retail operations.¹¹⁶

C. BellSouth Has Not Provided Adequate Information To Show That Its Performance Data Is Reliable.

73. BellSouth has also failed to provide information sufficient to permit others to rely on its performance data with any assurance that it accurately represents what it purports to represent. In the first place, it is essential that each measurement presented by BellSouth be clearly defined, documented, and not subject to unilateral redefinition by BellSouth.¹¹⁷ What is included and what is excluded in collecting the data must not be subject

¹¹⁵ See, e.g., *Bell Atlantic/NYNEX Order*, App. D, Measures 1 (average response time per pre-ordering transaction), 3 (average response time for order confirmation), 4 (average response time for order rejection), 6 (average response time for order completion notification).

¹¹⁶ There is also no need for BellSouth to report its performance on a "percentage within target" basis, because if BellSouth has the data to report the percentage within target, it should also have the data to report its actual performance.

¹¹⁷ See *Ameritech Michigan Order*, ¶ 212 (BOC must "ensure that its performance measurements are clearly defined"), ¶ 209 (BOC cannot rely upon performance measurements that are not "clearly explained" so as to make them "meaningful to [the Commission] and commenting parties").

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to ambiguity or unilateral modification by BellSouth, but must be clearly fixed, for the numerical value of a measure can be significantly altered by selective inclusion or exclusion.

1. **BellSouth's Performance Data Lacks Clarity.**

74. The need for clear definitions regarding what data will be included in each measurement is demonstrated by BellSouth's unilateral decision to include in its measurement of the timeliness of BellSouth's return of firm order confirmations to CLECs only those "orders that flow through mechanically and entirely without human intervention."¹¹⁸ By unilaterally excluding all CLEC orders involving any manual processing whatsoever by BellSouth -- an exclusion that has no basis in the AT&T-BellSouth Agreement -- BellSouth has excluded all orders where the return of the FOC is likely to be delayed, and thus should have virtually guaranteed itself a high level of success in meeting the contractual FOC performance standard. I am also concerned that, although BellSouth has acknowledged this exclusion from its FOC measurement data, other similar exclusions may be hidden in the data BellSouth is reporting for other measurements. No data should be excluded from reported performance measurements unless the exclusion is clearly documented and supported by a factual showing of unique operational conditions.

75. BellSouth also fails to disclose any information about adjustments to the data it reports to the Commission. For example, in his testimony on "order flow-through,"

¹¹⁸ Stacy PM Aff., Ex. WNS-8, p. 2.

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Mr. Stacy admits that in July and August, BellSouth's flow though percentage was in fact only XX and XX percent respectively based on BellSouth's analysis of "eligible LSRs" -- a term that he does not define.¹¹⁹ Mr. Stacy then purports to compute "adjusted flow thru" numbers for each month based on some "BST analysis" of "SOER errors" for which he provides no information whatsoever.¹²⁰ The total absence of any information about BellSouth's so-called "SOER error analysis" -- an analysis which was never presented to the South Carolina Commission -- precludes any other party from providing any meaningful comment on BellSouth's adjusted flow through numbers. Consistent with the Commission's repeated statements that a BOC must provide all of its factual evidence with its original application,¹²¹ BellSouth should be precluded from relying on such undefined "adjustments" to its performance data.

76. The manner in which BellSouth has obtained performance data through special studies or tests has also not been fully disclosed or explained. For example, Mr. Stacy presents the results of two tests that BellSouth conducted in an attempt to measure response

¹¹⁹ Stacy OSS Aff., Ex. WNS-41.

¹²⁰ Stacy OSS Aff., ¶ 111 & Ex. WNS-41.

¹²¹ See, e.g., *Ameritech Michigan Order*, ¶¶ 49-50.

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times for certain pre-ordering transactions at selected sites.¹²² However, Mr. Stacy provides no details as to how those tests were conducted or how BellSouth measured the access times reported for the various legacy systems or databases involved. Without considerable additional information about these tests, it is impossible for other parties to provide any meaningful analysis or comments, and impossible for the Commission to assess the validity of BellSouth's performance data on pre-ordering response times.¹²³

2. BellSouth's Performance Data Lacks Audit Safeguards.

77. The data collected by BellSouth also needs to be retained and structured so that interested parties can independently compute BellSouth's measurement and, where appropriate, compare that result to independently derived measures, such as data that may be captured independently by the CLECs. In addition, requirements need to be established for the retention of the raw data used to derive the monthly reported measures sufficient to enable

¹²² See Stacy OSS Aff., ¶ 109 & Ex. WNS-37.

¹²³ The pre-ordering response time studies conducted by BellSouth were not presented in the proceedings before the South Carolina Commission. However, it is apparent even from the limited information about them that Mr. Stacy provides here that BellSouth has not yet standardized the data collection criteria and measurements involved, and that new mechanisms and procedures are still being developed in an attempt to provide "more accurate comparisons" (see Stacy OSS Aff., ¶ 109).

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an independent audit to be performed.¹²⁴ Without the adoption of these audit safeguards, CLECs, the Commission and other regulatory agencies cannot validate BellSouth's data

78. Although BellSouth states that it "plans to provide" CLECs with access to a so-called "Data Warehouse," which it apparently has just created, it provides virtually no information about what will be contained in this data warehouse or how CLECs or other interested parties will be permitted to use it.¹²⁵ While the creation of this data warehouse may be a step in the right direction, a far more detailed commitment by BellSouth to permit the Commission, other regulators, and interested CLECs to audit BellSouth's performance measurements and underlying data should be required.

**V. BELLSOUTH'S PERFORMANCE MEASUREMENTS ARE NOT ADEQUATE
SIMPLY BECAUSE THEY ARE DERIVED FROM THE AT&T-BELLSOUTH
INTERCONNECTION AGREEMENT.**

79. There is also no basis for BellSouth's contention that its performance measurements are sufficient because some of them are based on the service quality

¹²⁴ The AT&T-BellSouth Agreement states that "BellSouth shall . . . provide the raw data used to calculate each measurement for AT&T [under the Agreement] as reasonably requested by AT&T," and that Bell-South and AT&T shall jointly develop an audit plan with respect to BellSouth's installation intervals for its own customers. AT&T-BellSouth Agreement, Att. 12, Sec. 1.2 & 2.1 (Stacy PM Aff., Ex. WNS-4). However, that proposed audit plan is far too narrowly limited to only one of BellSouth's many proposed performance measurements, and BellSouth has not established procedures for the implementation of that audit right. Moreover, both the obligation to provide raw data and the limited audit right under the Agreement extend only to AT&T.

¹²⁵ See Stacy PM Aff., ¶¶ 13, 15.

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measurements contained in BellSouth's interconnection agreement with AT&T.¹²⁶ As the Commission made clear in its *Ameritech Michigan Order*, "evidence showing that a BOC is satisfying the performance standards contained in its interconnection agreements does *not* necessarily demonstrate compliance with the statutory [nondiscriminatory access] standard."¹²⁷ Rather, "equivalent access [is] the standard of performance required by section 271," and meeting that standard requires evidence that the BOC's performance for CLECs is equivalent to the BOC's performance of the same or analogous functions for itself.¹²⁸ Thus, the Commission made clear that contractual performance standards have no relevance to the parity of performance issue unless there is no analogous function that the BOC performs for itself or the contractual standard is shown to be set at a level that represents the BOC's actual performance for itself.¹²⁹

80. As the Commission thereby recognized, contractual performance standards serve a different purpose. Contractual performance standards or requirements are designed to aid in the enforcement of a private agreement between the parties. They are the product of negotiations between adverse parties, one of which has an incentive to impose

¹²⁶ See, e.g., BellSouth Brief, p. 56; Stacy PM Aff., ¶¶ 25, 40.

¹²⁷ *Ameritech Michigan Order*, ¶ 142 (emphasis added).

¹²⁸ *Id.*

¹²⁹ *Id.*, ¶¶ 141-142.

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rigorous standards, while the other has the opposite incentive of establishing standards that can be met with little or no difficulty. Where along that spectrum the final contractual performance standard ends up will depend on the relative strength and bargaining power of the respective parties. In this regard, it is important to keep in mind that AT&T and other CLECs do not possess the same information as BellSouth regarding either BellSouth's capability to make its systems, services and facilities available to CLECs or the level of BellSouth's performance for its own local retail operations. As a result, at the time of the contract negotiations, the CLECs had relatively little information about what level of performance under the contract would represent parity with BellSouth's performance of the same or comparable functions for its own retail operations. On the question of contractual service quality standards, therefore, CLECs were at a significant disadvantage in the negotiation process due to the wide disparity in the parties' access to information regarding both BellSouth's capabilities and its level of performance for its own local retail operations.

81. Whatever the contractual service quality requirements that resulted from that negotiation process, however, those performance requirements establish only the minimum or *worst* level of performance that will avoid contractual remedies for poor performance. Meeting such minimum contractual requirements does not establish that BellSouth's performance for CLECs is at parity with BellSouth's performance for its own retail

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operations.¹³⁰ For example, there is obviously no parity if BellSouth obligates itself to install residential service for AT&T's customers within a four day contractual requirement, but routinely installs such service upon request for its own customers within 24 hours. Likewise, there is no parity if BellSouth returns firm order confirmations to CLECs within one business day, while confirming orders submitted by its own customer service agents while the customer is still on the line. No inference of nondiscrimination can be drawn simply from the fact that BellSouth is satisfying a minimum contractual service quality requirement.¹³¹

82. The difference between parity of performance and the performance measurements established in Attachment 12 of the AT&T-BellSouth Agreement is also made clear in the contract itself. The Agreement specifically imposes on BellSouth a contractual

¹³⁰ Likewise, the quality of service standards traditionally imposed on local exchange carriers by state commissions establish only minimum acceptable levels of service which incumbent LECs must meet to avoid regulatory sanctions, or as Mr. Stacy has described them, the minimum levels of service "deemed adequate" for BellSouth's retail customers by state regulators. Stacy Rebuttal Testimony, filed July 11, 1997, in *In re Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996*, Georgia Pub. Serv. Comm'n Docket No. 6863-U, p. 11. Those state standards do not reflect BellSouth's actual performance for its own customers -- the performance level needed to determine whether parity is being delivered to CLECs -- which should be far higher than the minimum requirement.

¹³¹ On the other hand, a *failure* to meet a minimum contractual performance standard should presumptively establish a failure to deliver parity of performance in light of the fact that an incumbent LEC is unlikely to agree to a contractual performance requirement whose violation would subject it to monetary penalties unless it is confident that it will be able to achieve that level of performance based on its experience in providing the same or analogous performance for itself and its own customers.

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obligation to provide a quality of performance for AT&T that is "at least equal to" BellSouth's performance for itself and its own customers, stating:

"In providing Services and Elements, *BellSouth will provide AT&T with the quality of service BellSouth provides itself* and its end-users. BellSouth's performance under this Agreement shall provide AT&T with the capability to meet standards or other measurements that are *at least equal to* the level that BellSouth provides or is required to provide by law or its own internal procedures."¹³²

The Agreement then requires BellSouth to satisfy "all service standards, measurements and performance requirements set forth in the Agreement" -- including the parity requirement established in the two preceding sentences -- "*and* the measurements specified in Attachment 12" of the Agreement.¹³³ Finally, any possible ambiguity as to the paramount importance of the parity requirement is laid to rest in the final sentence of this section which states that in the event BellSouth provides a higher level of performance for itself than the contractual service quality requirements established by the parties in Attachment 12, BellSouth's obligation is to provide AT&T the *higher* standard of performance -- that is, if BellSouth's actual level of service for its own retail operations is better than the performance standard set in Attachment

¹³² Agreement between BellSouth Telecommunications, Inc. and AT&T Communications of the Southern States, Inc. for South Carolina, effective June 2, 1997, Section 12.1 ("AT&T-BellSouth Agreement") (emphasis added).

¹³³ *Id.* ("BellSouth shall satisfy all service standards, measurements and performance requirements set forth in the Agreement *and* the measurements specified in Attachment 12 of this Agreement") (emphasis added).

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12, the contractual performance standard is superseded and BellSouth must provide parity with BellSouth's performance for itself:

"Any conflict between the standards, measurements, and performance requirements BellSouth provides itself and the standards, measurements and performance requirements set forth in Attachment 12 shall be resolved in favor of the higher standard, measurement and performance."¹³⁴

The AT&T-BellSouth Agreement thus makes clear that the performance measurements established by the parties in Attachment 12 of the Agreement merely supplement -- and do not limit or definitively define -- BellSouth's paramount obligation to provide parity of performance for CLECs.

83. The distinction between parity of performance and the target performance levels established by the parties in Attachment 12 of the AT&T-BellSouth Agreement is also apparent from the provisions of Attachment 12, which states at the outset that "BellSouth, in providing Services and Elements to AT&T pursuant to this Agreement, shall provide AT&T the *same quality of service that BellSouth provides itself* and its end-

¹³⁴ *Id.* The Agreement also gives AT&T the "right to request targets that exceed parity," provided that AT&T agrees "to reimburse BellSouth for the reasonable and demonstrable cost BellSouth incurs to provide such performance." *Id.*, Att. 12, Sec. 1.4. In that case, the target establishes the contractual performance obligation rather than BellSouth's performance for itself.

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users."¹³⁵ While the performance measurements and target performance levels contained in Attachment 12 may help to define and enforce BellSouth's performance obligations under the contract, therefore, Attachment 12 itself makes clear that they do not displace or supplant BellSouth's obligation to provide parity of performance to AT&T.

84. It is also important to note that the AT&T-BellSouth Agreement does not purport to establish a complete set of the performance measurements that are required to show nondiscriminatory performance for CLECs. Thus, the Agreement itself states repeatedly that additional performance measurements and objectives will be required.¹³⁶

85. Further, a number of the performance measurements identified in the AT&T-BellSouth Agreement still have not been established by the parties. For example, with respect to the "desired due date" measure, the Agreement states that "BellSouth has stated that it cannot provide this measurement at this time."¹³⁷ Similarly, with respect to the "service

¹³⁵ AT&T-BellSouth Agreement, Att. 12, Sec. 1.1 (emphasis added).

¹³⁶ See, e.g., AT&T-BellSouth Agreement, Sec. 12.2 ("The Parties acknowledge that the need will arise for changes to the measurements specified in Attachment 12 during the terms of this Agreement" including "the addition" of new measurements); *id.*, Att. 12, Sec. 1.4 ("BellSouth and AT&T recognize that percentage target performance levels have not been provided for all measurements and that such targets for certain categories of performance will be required"); Att. 15, Sec. 9.4 ("Performance measurements [for ordering and provisioning, maintenance and repair, and pre-ordering] shall be established pursuant to Section 12 of the General Terms and Conditions of this Agreement").

¹³⁷ AT&T-BellSouth Agreement, Att. 12, Sec. 2.1.

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orders provisioned as requested" measure, the Agreement states that "BellSouth and AT&T agree to review appropriate information and develop a proposal to provide this measurement no later than August 1, 1997,"¹³⁸ a deadline which was not met. Moreover, even Mr. Stacy has acknowledged that a number of the target installation intervals under the Agreement still have not been finalized.¹³⁹ As the Commission has made clear, such future plans or promises to measure performance for CLECs obviously do not establish that BellSouth is providing parity of performance to CLECs at the present time.¹⁴⁰

VI. CONCLUSION

86. Notwithstanding the Commission's substantial efforts in prior decisions to provide guidance to BOCs about the performance data that they need to submit in order to meet their burden of establishing that nondiscriminatory performance is being provided to CLECs, the performance data submitted by BellSouth with its Section 271 application for South Carolina is obviously inadequate. As discussed above, BellSouth has failed to provide

¹³⁸ *Id.*, Att. 12, Sec. 2.6.

¹³⁹ See Stacy Direct Testimony, filed June 6, 1997, in *In re Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996*, Georgia Pub. Serv. Comm'n Docket No. 6863-U, pp. 4-5; AT&T-Agreement, Att. 12, Sec. 1.4.

¹⁴⁰ See *Ameritech Michigan Order*, ¶ 55 ("we find that a BOC's promises of *future* performance . . . have no probative value in demonstrating its *present* compliance with the requirements of section 271"), ¶ 152 (emphasis in original).

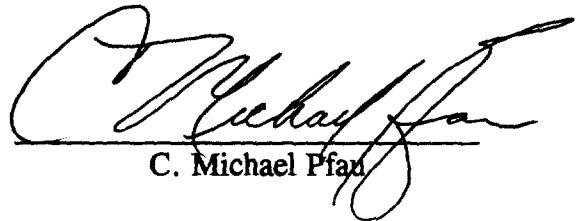
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several categories of performance data that are essential to any determination of parity, and the performance data that BellSouth has submitted with its application does not show that parity of performance is presently available to CLECs. In addition, BellSouth has not presented its performance measurement information to the Commission in ways that would permit the Commission accurately to compare BellSouth's performance for CLECs with its performance for itself. BellSouth's application should therefore be denied.

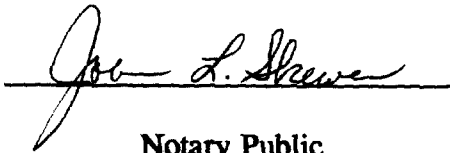
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VERIFICATION

I hereby verify, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.


C. Michael Pfaus

Subscribed and sworn to before me
this 16th day of October, 1997


Notary Public

JOE L. SKEWES
Notary Public, State of New Jersey
My Commission Expires Apr. 14, 2002

ATTACHMENT 1